



INTERIOR BOARD OF INDIAN APPEALS

Lois Candelaria v. Sacramento Area Director, Bureau of Indian Affairs

27 IBIA 137 (01/24/1995)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

LOIS CANDELARIA

v.

SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-59-A

Decided January 24, 1995

Appeal from the denial of approval of a lease of tribal land.

Affirmed.

1. Indians: Lands: Tribal Lands

The definition of tribal lands for Federal purposes is a question of Federal, not tribal, law.

2. Indians: Lands: Tribal Lands--Indians: Trust Responsibility

The Bureau of Indian Affairs owes a trust responsibility to the owner of trust land. When the land is held in trust for an Indian tribe, the trust responsibility is owed to the tribe.

3. Indians: Lands: Assignments--Indians: Lands: Tribal Lands--
Indians: Leases and Permits: Secretarial Approval

When a tribal member seeks approval by the Bureau of Indian Affairs of a lease of tribal land assigned to him/her, that individual must begin by showing that he/she is in fact the legally recognized assignee.

4. Indians: Lands: Assignments- -Indians: Lands: Tribal Lands--Indians:
Leases and Permits: Secretarial Approval--Indians: Trust Responsibility

It is within the discretion of the Bureau of Indian Affairs, in exercising its trust responsibility to a tribal landowner, to determine that a lease of assigned tribal lands which directs all of the income to the assignee does not appropriately benefit the tribe.

APPEARANCES: Art Bunce, Esq., Escondido, California, for appellant; Anne Hamilton, pro se; Erica L.B. Niebauer, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Area Director; Arthur Gould, for Cahuilla Country Club Estates.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Lois Candelaria seeks review of a December 7, 1993, decision of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to approve a lease of tribal land on the Cahuilla Indian Reservation. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

On March 10, 1991, a lease was executed by the Chairman of the Cahuilla Band of Indians (Band), as lessor, and Cahuilla Country Club Estates (CCCE), a joint venture, as lessee. The lease was concurred in by tribal member Paul Pablo, a.k.a. Frankie Lubo (Pablo). The lease appears to cover approximately 850 acres in secs. 27, 28, and 33, T. 7 S., R. 2 E., Riverside County, California. The land is held in trust for the Band by the United States, and, at the time the lease was executed, was apparently assigned to Pablo. The recital portion of the lease states in part:

Internally, the Lessor [the Band] recognizes that the land to be leased belongs to Tribal Member Paul Pablo (a/k/a, Frankie Lubo) although the United States holds the title in trust for the Lessor. Although this lease is in the name of the Cahuilla Band of Indians as lessor, the Tribe recognizes that Mr. Pablo is its primary beneficiary.

All rentals under the lease were to be paid to Pablo.

The purpose of the lease was to develop a fully self-contained resort and residential facility, including an 18-hole golf course. The lease provided for a term of 65 years, if appropriate authorizing legislation was passed. That legislation was enacted on October 24, 1992. P.L. 102-497, 106 Stat. 3255, 3256.

Amendment 2 to the lease indicated that Pablo died on November 27, 1992, and substituted appellant for Pablo.

Although initial work was done on the lease, the Superintendent, Southern California Agency, BIA, expressed concerns about the legality of the rental provisions, and sought input from the Area Director. The lease was submitted to the Area Director, who, by letter dated December 7, 1993, declined to approve it.

Appellant appealed this decision to the Board. Briefs have been filed by appellant, the Area Director, and Anne Hamilton (Hamilton), who disputes appellant's claim to the assignment. A statement not supporting either side was filed by Arthur Gould on behalf of CCCE.

Discussion and Conclusions

Initially, the Board notes that BIA's approval or disapproval of a lease of trust land is a discretionary decision. In reviewing BIA discretionary decisionmaking, it is not the Board's role to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. Rathkamp v. Billings Area Director, 21 IBIA 144, 148 (1992), and cases cited therein.

Appellant appears to suggest that the land at issue here is not tribal land. Although she admits that the land is held by the United States in trust for the Band, she cites the Band's March 6, 1983, Land Use and Trespass Ordinance (Ordinance) 1/ in support of her argument that land assigned to the Band's members is not tribal property. Article II, section 2.3, of the Ordinance defines "tribal property" as "[n]on-assigned land and tribal structures within the exterior boundaries of the Cahuilla Indian Reservation. This shall include, but is not limited to, the following: * * * approximately 2,000 acres consisting of all of Sections 1, 2, and the majority of Section 3, Township 8 S., Range 2 E., SBM." Article II, section 2.4, defines "assigned land" as "[1]and within the exterior boundaries of the reservation confirmed to the exclusive use of individual tribal member(s), primarily through inheritance, which is recognized by the Cahuilla General Council." Articles III and IV of the Ordinance set out permissible uses of "tribal property."

[1] 25 CFR 162.1(c) defines tribal land as "land or any interest therein held by the United States in trust for a tribe, band, community, group or pueblo of Indians * * *. The term also includes assignments of tribal land." The definition of tribal lands for Federal purposes is a question of Federal, not tribal, law. Here, the issue is whether BIA can and/or should approve a lease of trust land in accordance with Federal statutes and regulations. This is clearly a Federal purpose. The Board knows of no authority under which a tribe can exclude land held in trust for it by the United States from the operation of statutes and regulations dealing with tribal lands, or can disavow ownership of such land without the approval of the Department. The Board holds that the land covered by the proposed lease is tribal land.

[2] Definite rights and obligations arise from the fact that this is tribal land. As relevant to this case, BIA owes a trust responsibility to the owner of trust land. Even though appellant is a tribal member, because the land is tribal land, BIA's trust responsibility is to the Band. See, e.g., Johnson v. Acting Phoenix Area Director, 25 IBIA 18 (1993); Welmas v.

1/ Appellant states that the ordinance was not approved by any Federal official. The Area Director indicates disagreement with certain provisions in the ordinance. However, no party to this proceeding disputes the existence of the Ordinance or the fact that the Band follows it.

Sacramento Area Director, 24 IBIA 264 (1993); Gullickson v. Aberdeen Area Director, 24 IBIA 247 (1993).

There is no dispute that the tribal land covered by the lease is assigned land within the meaning of both the Ordinance and 25 CFR 162.1. Although the Ordinance is silent as to permissible uses of assigned land, in Cahuilla Band of Indians v. Candelaria, No. CV 91-5938-ER (C.D. Calif. Mar. 10, 1992), the court held that the Band had authority to regulate the use of assigned tribal land and to prohibit certain uses. ^{2/}

25 CFR 162.1(c) provides that "[u]nless the terms of the assignment provide for the leasing of the land by the holder of the assignment, the tribe must join with the assignee in the grant of a lease." The regulations thus contemplate that a tribal land assignment may be leased. Appellant has not asserted that the terms of any relevant assignment provide for leasing by the assignee. Therefore, under the regulations the Band must join in the grant of a lease of this assignment.

Tribal Resolution #91-06 authorized Pablo to lease his assignment to CCCE. Appellant states that she succeeded to Pablo's assignment in accordance with tribal custom and tradition, and relies on Resolution #91-06 as authorization for her to lease the assignment.

The Board first addresses appellant's claim that she is entitled to the assignment. In challenging appellant's claim, Hamilton argues she should be the assignee. The Board is not the proper forum for the determination of these competing claims. Absent express authority for BIA to become involved in the assignment of tribal land, this is an internal matter for resolution by the Band. Cf. Rogers v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 13 (1986), and Brewer v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 110, 89 I.D. 488 (1982), both of which found that BIA was specifically authorized to become involved in tribal land assignment decisions, with Flores v. Acting Anadarko Area Director, 25 IBIA 6 (1993), in which BIA acted merely to enforce a tribal determination concerning land assignments. Because there is no indication that BIA has a role in decisions concerning assignments of the Band's tribal land, neither BIA nor the Board has authority to determine the identity of the proper assignee of the land at issue.

However, even without Hamilton's challenge, there were questions concerning appellant's entitlement to the assignment under tribal law. The

^{2/} In Cahuilla Band of Mission Indians, the Band sought injunctive and other relief against appellant and others because they had failed to comply with the Band's order to halt commercial dumping of contaminated soils on appellant's assignment (not the assignment at issue here). In its Mar. 10, 1992, order, the court enjoined further dumping.

Board undertakes to interpret tribal law only when necessary to the disposition of a case pending before it, and defers to a tribe's reasonable interpretation of its own law. See, e.g., Van Zile v. Minneapolis Area Director, 25 IBIA 163, 167 (1994). In this case, the Board finds that although it must interpret the ordinance, no cognizable tribal interpretation has been presented. 3/

As noted supra, Article II, section 2.4, of the Ordinance states that assignments pass "primarily through inheritance, which is recognized the Cahuilla General Council" (emphasis added). Article II, section 2.1, defines "General Council" as the "[r]ecognized tribal members 21 years of age or older." Both the administrative record and appellant's submissions contain several tribal resolutions, based on General Council actions, recognizing succession to assignments. Appellant alleges that succession is not always officially recognized, but has presented no evidence in support of this allegation other than the fact that her purported succession was not officially recognized. The Board must base its decisions on the evidence and law presented. Based on the provisions of the Ordinance and the Band's apparent past practice, the Board concludes that succession to the Band's assigned lands must be recognized by the General Council. Appellant has provided no evidence that the General Council recognized her succession to the assignment at issue.

Appellant alleges she succeeded to Pablo's assignment according to tribal "custom and tradition." She contends that "Pablo's expressed wishes have been followed. It is common knowledge within the Band that he wished

3/ Appellant presents her personal interpretation of the Ordinance, submits an affidavit allegedly signed by 24 tribal members in support of her appeal, and argues that the lack of objection from the Band evidences her right to the assignment.

The unauthenticated signatures of persons purported to be members of the Band on a petition in support of appellant's appeal are not proof of appellant's entitlement to the assignment. On its face the petition has several problems, including (1) there is no evidence that the individuals who signed the petition are in fact tribal members, (2) there is no indication of the present number of tribal members, and (3) at least one name on the petition was signed for the individual by another person. Additionally, the Board has no information concerning the effectiveness of a petition under tribal procedures. Cf. Cahuilla Band of Indians, supra (declining to consider a petition presented in support of appellant's position on the grounds that the effectiveness of a petition under tribal law was a non-justiciable political question). In accordance with both the court's and its own findings, the Board declines to consider the petition for any purpose.

The fact that no objection from the Band appears in the record is not sufficient to prove either that the Band has considered the matter or that appellant is entitled to the assignment.

his assigned lands to pass on to [appellant], who is related to him" (Response to order to show cause at 1); cites her own statement in Amendment 2 to the lease that she succeeded to the assignment and argues that her "prima facie showing of ownership and standing * * * still stands" (Opening Brief at 8).

Appellant's reference to a prima facie showing cites her response to a Board order requiring appellant to show her standing to pursue this appeal. Although in a subsequent order the Board held that appellant had made a prima facie showing of standing, it left open the ultimate determination both of standing and of entitlement to the assignment.

[3] When a tribal member seeks BIA approval of a lease of tribal land assigned to her, she must begin by showing that she is in fact the proper assignee under tribal law. The Board concludes that appellant has failed to prove she is the legally recognized assignee of the tribal land at issue here because she has not shown she was recognized by the General Council as entitled to succeed to the assignment. The Board further concludes that BIA would violate its trust responsibility to the tribal landowner if it were to approve a lease of tribal land by a person who has not shown herself to be the proper assignee in accordance with tribal law. 4/

Appellant has also failed to prove that the General Council has authorized her leasing of the assignment in general, or her leasing of the assignment with all income directed to herself in particular. Appellant cannot rely on Resolution #91-06, which authorized Pablo to lease the assignment. That resolution authorized action by a particular individual assignee, and contained nothing indicating that the authorization extended to Pablo's heirs and/or successors- in- interest. The mere fact that the General Council approved Pablo's leasing of the assignment does not mean that it would also approve appellant's leasing of it, if she is, in fact, the proper assignee.

In addition, there is no credible evidence in the record or appellant's submissions showing that the General Council was aware of the rental income provisions of the lease proposed either by Pablo or by herself. Except for an unsubstantiated statement in appellant's reply brief, the only arguable evidence of such knowledge as to Pablo's lease, the signature of the tribal Chairman on the lease, does no more than raise a presumption that the Chairman had read the lease and understood what he was signing. The only evidence as to appellant's lease is the petition which cannot be considered for the reasons discussed in footnote 2. BIA would also violate its trust responsibility to the Band if it were to approve a lease of tribal land which directs all lease income to one tribal member with no evidence that the General Council was aware of, and affirmatively agreed to, that income provision.

4/ Even if official recognition of succession to an assignment is not always required for tribal purposes, when an assignee seeks Federal approval of an action relating to the assignment, she must be prepared to provide evidence of succession acceptable to the Federal forum.

However, despite its findings that appellant has proven neither her entitlement to the assignment nor her right to lease the assignment and direct all income to herself, the Board assumes, for the purpose of this discussion and in order to expedite final resolution of this matter, that appellant will be able to make these showings, and therefore addresses the merits of this appeal.

Although the Area Director listed several problems with the proposed lease, the parties all indicate that the only issue remaining to be decided is whether the Area Director erred in disapproving the lease because it directed all lease income to appellant.

Appellant first contends that the Area Director's decision is inconsistent with past practice. She provides materials, most of which are also included in the administrative record, which she argues show that BIA has not previously interfered with an assignee's leasing of his/her assignment, even though the lease income went to the assignee rather than to the Band. She also cites Assignment Ordinance No. 2 of the San Pasqual Band of Mission Indians, which was approved by the Commissioner of Indian Affairs on January 20, 1975, and which provides in Section I.E: "Any leasing by the holder of an assignment will be done with the approval of [BIA] and the Band as titled owners at the request of the assignee, with all proceeds assigned to the assignee." Appellant argues that BIA's consistent practice on the Cahuilla Reservation has been to allow all lease income to go to the assignee, and suggests that the reason for the Area Director's change in position is that she will receive substantial income from this lease in contrast to the small amounts of income previously received from leases of assignments.

The limited materials before the Board indicate that between 1913 and 1971 BIA did not object on at least four occasions when income from leased assignments was directed to the assignee rather than to the Band. The few documents presented, however, do not support a finding that this practice was always followed on the Cahuilla Reservation.

The Area Director cites an October 21, 1938, Solicitor's Opinion entitled "Law Governing Leases on the Palm Springs Reservation," as evidence that the Department has previously required that at least some income generated from leases of tribal land assignments go to the tribe. That Opinion states in part:

5. The tribe does not own the improvements placed upon tribal land by or under the direction of individual members of the tribe.

* * * * *

7. Such assignments may be purely for personal use and occupancy or they may permit leasing to outsiders under departmental supervision. If they permit leasing to outsiders, there

should be a definite provision as to the division of rentals between the individual, as the owner of the improvements, and the tribe, as the owner of the soil.

* * * * *

9. The Department may withhold its approval from any lease, permit or assignment which does not do substantial justice to the claims of the tribe as a whole and the individual Indians who may have built improvements in particular areas. [5/]

(I Op. Sol. on Indian Affairs 858, 859).

In regard to this particular situation, the Area Director stated:

Lending Secretarial approval to a lease, permit, or, other agreement which excludes the interest of the [Band] as a whole is not a prudent exercise of our trust responsibility and it is surely in conflict with the Secretary's policy to promote TRIBAL economic growth and self-sufficiency. We are required by Federal law to assure that when circumstances warrant, * * * the [Band] is compensated for utilization of tribal lands * * *. [Emphasis in original.]

(Decision Letter at 4).

[4] The evidence before the Board suggests that BIA's position concerning income from leases of assigned lands is not as simple as appellant argues. Both the regulations and the additional materials submitted during this appeal recognize that assignees of tribal land may lease their assignments when authorized to do so by the tribe. The regulations do not require that all income from leases of assigned tribal lands go either to the assignee or the tribe. The initial decision as to the appropriate use of lease income from tribal lands is up to the landowner, *i.e.*, the Band. However, in exercising the Secretary's discretionary authority to approve conveyances of tribal land, BIA has authority to decline to approve any

5/ Paragraph 18 of the proposed lease provides in part:

"All buildings and improvements, excluding removable personal property, residential units, and trade fixtures of Lessee, on the leased property shall remain on said property after termination of this Lease and shall thereupon become the property of the Lessor or, to the extent recognized by the custom and tradition of Lessor, of Mr. Pablo. During the term of this Lease, ownership of all such buildings and improvements, excluding removable personal property, residential units, and trade fixtures of Lessee, will be vested in Lessee, except as the parties and the Secretary and Approved Encumbrancer may otherwise agree in writing."

lease which it believes is not in the best interest of the tribal landowner. 6/

Assuming arguendo that the Area Director's decision is a change in position, or at least a change from the prior practice on the Cahuilla Reservation, BIA is not precluded from changing even a prior interpretation of law so long as the change is explained in order to show that it is not arbitrary or capricious. See Hopi Indian Tribe v. Director, Office of Trust and Economic Development, 22 IBIA 10, 16 (1992), and cases cited therein. If BIA can change a prior interpretation of law, it has at least as much authority to change a discretionary practice. Because the Board concludes that this standard of review is at least as high a standard as would normally apply to its review of BIA discretionary decisions, for the purposes of this discussion only, it will examine the Area Director's decision against this standard.

As the reasons for his refusal to approve the lease, the Area Director cited BIA's trust responsibility to the Band and the Departmental policy to promote tribal self-sufficiency and economic growth.

As already discussed, BIA's trust responsibility is to the Band. When a proposal is presented for leasing tribal land, the trust responsibility requires, at a minimum, that BIA ensure the Band benefits from the use of its land. The Board finds at least three factors relevant to the question of whether this particular lease was to the Band's benefit.

The first factor is the amount of income to be realized under the proposed lease. 7/ For purposes of this discussion, the Board accepts appellant's statements that the income previously produced from the leasing of assigned tribal lands was modest, and that the income under her proposed lease would be substantial. If a lease of assigned tribal land generates only a modest income, it is well within BIA's discretion to determine that the income is insignificant for tribal purposes, but is sufficient to allow the assignee to improve his/her standard of living and to become a productive member of tribal society, and to determine that this use of tribal land benefits the tribe. However, when a lease generates substantial commercial income, it is also within BIA's discretion to determine that the tribe does not appropriately benefit from the use of its land when that income goes exclusively to an individual tribal member. 8/

6/ Such a discretionary decision is subject to limited review by the Board and by the Federal courts. See, e.g., Rathkamp, supra; 5 U.S.C. § 706(2)(A) (1988).

All further citations to the United States Code are to the 1988 edition.

7/ The Board thus rejects appellant's suggestion that the Area Director erred to the extent he considered this factor.

8/ Cf. 25 CER 162.5(b), which provides:

"Except as otherwise provided in this part no lease shall be approved or granted at less than the fair annual rental.

The second factor is the proposed purpose of the lease. If the tribal land will be used in a way that does not significantly alter the present use, the tribe's future options concerning the land will not be seriously limited by the lease. Appellant's examples of instances in which BIA did not object to assignee leases of the Band's land all involved grazing leases. Such leases do not result in significant alterations to the land. In contrast, the lease proposed here would almost certainly result in an irrevocable commitment of tribal land to residential and resort use. This land use change will severely restrict the Band's future options concerning its land. BIA has discretion to determine that a lease which potentially irrevocably commits tribal land to a specific use should be considered differently than a lease which does not significantly restrict future options concerning the land.

The third factor, which is closely related to the second, is the term of the lease. Short-term leasing usually does not provide sufficient economic incentive for major development or other potentially irrevocable changes to the land. Long-term leasing is generally employed for the specific purpose of providing an incentive for major economic investment, especially in terms of improvements to the land.

In addition, if lease income is directed to the assignee, a short-term lease will deprive the tribe of income from its property for only a limited time. In contrast, under a long-term lease, such as the 99-year leases now permitted for the Band's lands and the 65-year lease proposed here, a tribe could well be prevented from receiving any income from its land for close to a century. The Band's need for income from its land and/or its prospective on assignees receiving all of the income from major long-term leases could well change significantly in that period of time, although the Band would have no recourse against the assignee. It is within BIA's discretion to consider the term of a lease in deciding whether a lease of assigned tribal land that directs all lease income to the assignee benefits the tribe.

The Board finds that BIA's trust responsibility to the Band to ensure that "when circumstances warrant, * * * the [Band] is compensated for utilization of tribal lands," fully supports any change in the Area Director's discretionary practice in regard to approval and/or non-interference in assignee leases of the Band's tribal land.

fn. 8 (continued)

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"(2) In the discretion of the Secretary, tribal land may be leased at a nominal rental for religious, educational, recreational, or other public purposes to religious organizations or to agencies of Federal, State, or local governments; for purposes of subsidization for the benefit of the tribe; and for homesite purposes to tribal members provided the land is not commercial or industrial in character."

The second reason the Area Director cited for his decision was Federal policy promoting tribal economic growth and self-sufficiency. Appellant also cites this policy in support of her diametrically opposed arguments. She states at page 12 of her opening brief:

For at least the last two decades, federal policy toward Indians has been to promote strong tribal self-government and economic self-sufficiency. As recently as 1991, the Supreme Court has repeated "Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'" Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, [498 U.S. 505, 510 (1991). 9/].

The Board agrees that Congressional policy strongly promotes tribal self-determination, economic growth, and self-sufficiency. The Department is committed to achieving these goals. However, it is clear from the legislation enacted that when Congress speaks of promoting "tribal" interests, it is speaking in terms of the tribe as a government responsible for the welfare and best interest of all of its members, not as a group of individuals concerned with their separate economic interests. Appellant asks the Board to hold that the "individual" self-sufficiency of a tribal member is the equivalent of "tribal" self-sufficiency as that concept is employed by Congress and the Department. The Board declines to make such a holding. In order for a tribe to be self-sufficient, it needs a source of income. When a tribe owns land that is capable of generating substantial income through leasing, the Department would not be promoting tribal self-sufficiency and economic growth by approving a lease of tribal land which would provide no income to the tribe.

Appellant contends that any action by BIA contrary to the Band's "conscious and intentional choice" (Opening Brief at 15) to allow all lease income from assigned lands to go to the assignee, is a paternalistic interference with tribal self-government. There is an inherent tension between the trust responsibility and tribal self-government. In some cases it may not be possible to reconcile these two doctrines completely. In those cases, one or the other doctrine must take precedence. Where the issue which must be resolved involves the Department's duty to ensure that the owner of trust land properly benefits from the use of that land, the Board believes the trust responsibility must take precedence. This appears especially true when the alleged interference with tribal self-government does not relate to the exercise of the tribe's governmental powers. The Board finds that the Area Director's decision not to approve the proposed lease

9/ The initial statement, which appears in California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987), relates to an attempt by the State of California to apply its gaming laws to a gaming operation on tribal land. The quotation in Citizen Band appears in the context of a discussion of tribal sovereign immunity.

without some economic benefit to the Band does not impermissibly interfere with the Band's right of self-government.

Based on the preceding discussion, the Board concludes that even if the Area Director's refusal to approve appellant's proposed lease is a departure from past practice, that departure has been adequately explained as an exercise of the trust responsibility to the tribal landowner and of the Federal policy to promote tribal economic growth and self-sufficiency. This explanation shows that the decision is not an arbitrary or capricious exercise of BIA's discretionary authority to approve or disapprove conveyances of trust land.

Appellant next contends that the Area Director's refusal to approve the lease violates 25 U.S.C. § 415. Section 415(a) provides in pertinent part:

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for * * * residential, or business purposes * * *. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of * * * lands held in trust for the Cahuilla Band of Indians of California which may be for a term of not to exceed ninety-nine years * * *.

Appellant argues that because neither section 415(a) nor 25 CFR Part 162 identifies the recipient of rentals, the Area Director erred in denying approval on the grounds that the rentals would not be paid to the Band, and that, to the extent there is any ambiguity in the statute and regulations, the ambiguity must be resolved in favor of the Band's exercise of its sovereignty. Appellant further contends that Congressional intent in allowing long-term leasing of the Band's lands will be frustrated if the assignees know that they will not receive the benefit of the development of lands "they and the [Band] both regard as 'their' land" (Opening Brief at 18) .

The Board finds no violation of 25 U.S.C. § 415(a) or 25 CFR Part 162. Neither the statute nor the regulations specifically address the question of who is to receive income generated by the leasing of tribal land. The failure to address this issue is probably at least in part based on the common sense presumption that income generated by a lease of land will be paid to the owner of the land. This is not a strange or surprising concept. It is probably also based in part on recognition that factual differences raised on a case-by-case basis may dictate how rentals are to be paid, and that, therefore, no hard-and-fast rule is possible or desirable. The Board declines to hold that the failure of section 415(a) and Part 162 to require that rentals from leases of tribal land be paid to the tribe means that BIA cannot, in the exercise of its trust responsibility, disapprove a lease of tribal land that does not benefit the tribe. 10/

10/ Appellant also argues that "the Area Director's new requirement that lease income must go to the lessor, rather than to the party to whom

The Board also rejects appellant's argument that Congressional intent in allowing long-term leasing of the Band's lands will be frustrated if assignees are not allowed to receive all lease income. Congressional intent was to afford the Band the benefits that can be derived from long-term leasing of its land. There is no indication that part of its intent was to enrich individual tribal members at the Band's expense.

Appellant's final argument is based on Kirschling v. United States, 746 F.2d 512 (9th Cir. 1984). Appellant contends that "the significance of Kirschling is that a change in the identity of the ultimate beneficiary of the proceeds of the use of trust land does not defeat the ability of the landowner to make that change" (Opening Brief at 20).

As stated by the court, the holding in Kirschling was that "[a] non-competent Indian's gift of allotment proceeds to a non-Indian is exempt from federal gift tax." 746 F.2d at 516. No one in Kirschling questioned the right of the Indian landowner to make a gift of proceeds from her trust allotment to another individual. The sole issue before the court, and the one decided by it, was whether a gift to a non-Indian of tax-exempt proceeds from a trust allotment was subject to Federal gift tax. Furthermore, even in citing Kirschling, appellant specifically denies that a gift was being made in her case. Kirschling is thus even farther off point. The Board finds that Kirschling does not support appellant's position.

The Board concludes that the Area Director's exercise of his discretionary authority to disapprove the lease proposed here should be affirmed. After reaching this conclusion, however, the Board does not require a particular payment plan for the lease income. Lease income may be apportioned between the Band and the assignee. If BIA were to require such an apportionment, it is within BIA's discretion to evaluate all relevant factors, including for example, the economic impact on the Band of the potentially irrevocable commitment of this tribal land to the specific purpose proposed by the assignee. BIA may and should require that any such apportionment be affirmatively agreed to by the Band and that the Band's agreement be conclusively documented. Alternatively, BIA might require that all lease income be paid to the Band. If, as appellant contends, the Band truly wants the income to go to the assignee, the Band could simply pay the income over to the assignee, in whole or in part, after receiving it. This procedure would seem to be most in keeping with the Band's right to self-determination, because it would permit the Band to retain control over lease income from its land.

fn. 10 (continued)

the lessor has designated, is either * * * a substantive rule of general applicability or an amendment or revision of such a rule" in violation of 5 U.S.C. §§ 552 and 553 (Opening Brief at 19). Based on the evidence presented in this case and on the preceding discussion, the Board cannot conclude that this is either a "new requirement" or "a substantive rule of general applicability."

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Sacramento Area Director's December 7, 1993, decision is affirmed. 11/

//original signed

Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge

11/ Arguments not specifically addressed were considered and rejected.